SUBJECT INDEX

	Page
CITATIONS TO OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	9
APPENDIX A - Opinion of the United States Court of Appeals for the Ninth Circuit	11
APPENDIX B - Judgment of the United States Court of Appeals for the Ninth Circuit	20
APPENDIX C - Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing	21
APPENDIX D - Title 18, U.S.C., Section 545	22
APPENDIX E - Constitution of the United States, Amendment V	23

TABLE OF AUTHORITIES CITED

Page

CASES

Roviaro v. United States, 353 U.S. 53 (1957). . 7, 8

Rugendorf v. United States,
376 U.S. 528 (1964) 7, 8

United States ex rel Drew v. Myers,
327 F.2d 174 (3rd Cir., 1964). 9

People v. Kiihoa, 53 C.2d 748, 752;
3 Cal. Rep. 1; 349 P.2d 673 (1960). 9

CODES

28 U.S.C. 1254(1) 2

18 U.S.C. Section 545 2

CONSTITUTION

Constitution of the United States,
Amendment V 2

RULES

Rule 22 (2) Rules of the Supreme Court 2

Rule 37 (c) Federal Rules of Criminal
Procedure 2

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. _____

LAWRENCE RAYMOND KING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Lawrence Raymond King, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on July 2, 1965 (Appendix B). A petition for rehearing was denied by the same court by order filed August 4, 1965 (Appendix C).

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals of July 2, 1965, is not reported at this date but is set forth in Appendix A, infra, page 11.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 2, 1965, and is set forth in Appendix B, infra, page 20. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), Rule 22(2) Rules of the Supreme Court and Rule 37(c) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Does the Due Process guaranty of the Fifth Amendment protect an accused against being effectively precluded from determining the identity of a material witness by imposing what amounts to an absolutely impossible burden?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provision involved is Title 18, U.S.C. Section 545, which statute is set out in verbatim in Appendix D, infra, page 22. The constitutional provision involved is contained in the Fifth Amendment to the Constitution and is set out verbatim in Appendix E, infra, page 23.

STATEMENT

An indictment was returned against petitioner by the Grand Jury for the United States District Court, Southern District of California, Southern Division, which indictment was filed April 4, 1964 (C.T., p. 2). [References to the Clerk's Transcript are hereinafter designated C.T., and references to the Reporter's Transcript are hereinafter designated R.T.]

The indictment was in two counts, Count One charging smuggling and clandestinely introducing into the United States approximately 500,000 amphetamine tablets, and Count Two charging transportation and concealment of the same contraband.

A plea of not guilty was entered (C.T., p. 4) and motions for a bill of particulars and to suppress evidence were filed (C.T., pp. 5, 10). The motion to suppress was denied (R.T., p. 2, 28; C.T., p. 18). Subsequently, after trial by jury, a verdict of guilty on both counts was returned (R.T., pp. 119-120).

At the time of the hearing on the bill of particulars (R.T., p. 4), during the motion to suppress evidence (R.T., p. 21) and during the course of the trial (R.T., p. 52), petitioner's counsel requested the identity of the informant. With respect to the attempt to determine the identity of the informant during trial as a material witness on the question of guilt or innocence, the trial court ruled that petitioner had not demonstrated the materiality of the informant's identity (R.T., pp. 96-97) and then denied a request for a short continuance to enable counsel for petitioner to demonstrate or attempt to demonstrate the materiality of the informant's identity

(R.T., p. 65; 97).

During actual trial of the cause, John D. Maxcy, a United States Customs Agent (R.T., p. 34) testified that on March 6, 1964, he observed a vehicle enter the United States from the port of entry at San Ysidro (R.T., p. 35). He followed the vehicle north on Highway 101 to Chula Vista where the automobile was stopped and the driver determined to be petitioner (R.T., p. 35). The agent testified, over objection (R.T., p. 37), that he searched the vehicle operated by petitioner and found the amphetamine which was later stipulated to have been manufactured in the United States (R.T., p. 36, 38-40).

The amphetamine was received in evidence over objection (Exhibit 1, R.T., p. 83). A motion for judgment of acquittal after the government rested was denied (R.T., p. 84) and renewed and again denied after petitioner rested without putting on evidence (R.T., p. 98, 102).

During a hearing outside the presence of the jury, counsel for petitioner attempted to ascertain the identity of the informant, or at least ascertain and present for consideration by the court evidence which would enable the court to make a determination as to whether the informant was or was not a material witness (R.T., p. 43; 52 through 72-A; 94-98). Despite the government agents playing "word games" with the term "informer", counsel at trial was finally able to establish that agent Maxcy had received information from agent Brockman of the Customs Service (R.T., p. 55). Brockman, in turn, received his information from agent Larkworthy of the Food and Drug Administration (R.T., p. 55), who in turn, got his information from agent Harry R. Sumega,

an inspector in the office of the Food and Drug Administration (R.T., p. 59). Sumega's "informant" then turned out to be Sergeant Goodwin of the Los Angeles County Sheriff's office (R.T., p. 60). The record is absolutely clear that all the federal agents, down to and including Sumega, knew nothing about the true informant or his relationship to the case or the source from which the true informant got his information (R.T., pp. 59-60).

Counsel at trial immediately pointed out to the court that he wished to demonstrate the materiality of the informant's identity and asked leave to make arrangements to have Sergeant Goodwin appear in court (R.T., p. 63), noting that it was impossible for counsel to lift himself by his own bootstraps (R.T., p. 63, 65).

During a noon recess, counsel for petitioner contacted Sergeant Goodwin and thereafter represented to the court that a subpoena had been issued and delivered to the United States Marshal for Goodwin's appearance the following morning (R.T., p. 68). It was pointed out that the day when Mr. Larkworthy was on the stand was the first time counsel for petitioner had been apprised of the person who was in truth and fact next to the informant (R.T., p. 68). It was stipulated that if Goodwin did appear, he would refuse to reveal the identity of the informant; however, counsel pointed out to the court that it was necessary to have Goodwin there in order to establish the materiality of the informant's identity (R.T., p. 70).

Prior to recessing on Thursday afternoon, the court was advised by the United States Attorney that Goodwin was on vacation (R.T., p. 72). The following morning, Friday, counsel for petitioner, with the concurrence of

the United States Attorney, represented that attempts to reach Sergeant Goodwin were unsuccessful. A deputy sheriff named Rick Burman, however, was contacted and it was stipulated that if Burman were called as a witness he would testify that he was a deputy sheriff with the Los Angeles County office and was present at all contacts between Goodwin and the informant and that Burman knew the identity of the informant (R. T., p. 94). In addition to the information passed to the Food and Drug Administration, the officers received detailed information from the informant which they would decline to reveal because it would tend to identify him. Specifically, that they would decline to identify the informant, they would decline to advise whether or not the informant is a resident of Los Angeles or Tijuana or how close the informant was to the venture; whether the informant advised where and when delivery of the amphetamine was to be made; whether the informant advised where the amphetamine was picked up; where the amphetamine was placed in the car; who was present when the amphetamine was placed in the car; whether the informant was present or observed the compartments or how the compartments where the amphetamine was discovered were constructed, or who was present when the construction was done (R. T., pp. 94-95).

Counsel for petitioner further offered to stipulate that the claim of privilege would be asserted - however, the court was unclear as to whether such a privilege would be sustained. Counsel for petitioner then pointed out that the only alternative would be to have officer Burman appear in court and represented that Goodwin was on vacation and the marshal was unable to effect service of the subpoena (R. T., p. 96). Counsel for petitioner then moved for a short continuance in order to permit the obtaining of Burman as a witness and, in the

alternative, move that the case be dismissed on the ground that petitioner was prevented from properly preparing his defense, which requests for relief were both denied (R. T., p. 97).

REASONS FOR GRANTING THE WRIT

The instant case graphically illustrates the need for this Court to clarify the standard to be applied in determining whether the identity of an informant will or will not be required under the Court's ruling in Roviaro v. United States, 353 U.S. 53 (1957) as again considered in Rugendorf v. United States, 376 U.S. 528 (1964).

Petitioner's case also demonstrates the necessity for this Court to point out unequivocally that the rules laid down so far as due process guarantees are concerned cannot be effectively finessed by law enforcement officials who disagree with the holding. To say that the Roviaro decision was treated in a cavalier method by the officers in the instant case would be an understatement. Even before trial, at the time of the hearing of the motion to suppress, agent Maxcy described the source of the information as "an informant we knew and deemed to be reliable" (R. T., p. 11). It's hard to believe that the "reliable informant" turned out to be a federal Food and Drug Administration agent and two Los Angeles County deputy sheriffs (R. T., p. 55, 60 and 94). The concern of law enforcement officers for sources of information is understandable but that concern cannot take the form of conducting investigations in a manner which operate in practice to overrule the decisions of the Supreme Court of the United States. This Court has made it abundantly clear that when the informant is a material witness on the question of guilt

or innocence, the privilege of nondisclosure must give way:

> "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." Roviaro v. United States, supra, p. 60-61.

The instant case certainly demonstrates the need for some additional pronouncements from this Court concerning the application of the foregoing principle. The record clearly establishes that the informant was not simply a supplier of information but was so close to the transaction that any information about his participation would reveal his identity (R.T., p. 94, 95). It would appear obvious that on this showing, his identity should have been revealed.

If counsel for petitioner should have gone further than he did, then the reason further steps were not taken is because they were precluded by the trial court. The record is clear that petitioner's counsel diligently attempted to avoid the pitfall demonstrated in the Rugendorf case where the majority opinion noted:

> "Having failed to develop the criteria of Roviaro necessitating disclosure on the merits, we cannot say on this record that the name of the informant was necessary to his defense." Rugendorf v. United States, supra, p. 535.

Concededly, the requirements which must be met in order to require identifying an informant are strict. It would appear, however, that fundamental fairness requires that at least an accused be given the opportunity of attempting to meet these strict standards and that, if the accused is prevented from so demonstrating, his substantial rights are prejudiced.

See: United States ex rel, Drew v. Myers, 327 F. 2d 174 (3rd Cir., 1964);

People v. Kiihoa, 53 C. 2d 748, 752; 3 Cal. Rep. 1; 349 P. 2d 673 (1960).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SHEELA, O'LAUGHLIN, HUGHES and HUNTER

PETER J. HUGHES
Counsel for Petitioner

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LAWRENCE RAYMOND KING, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 19,624

[July 2, 1965]

On Appeal from the United States District Court
for the Southern District of California
Southern Division

Before: BARNES, HAMLIN and ELY, Circuit Judges

HAMLIN, Circuit Judge

Lawrence R. King, appellant herein, was charged in an indictment returned by the United States Grand Jury for the Southern District of California, Southern Division, in two counts: One, with smuggling approximately 500,000 amphetamine tablets, which merchandise should have been invoiced; and Two, with fraudulently and knowingly receiving and concealing approximately 500,000 amphetamine tablets which to his knowledge had been imported into the United States contrary to law, a violation of 18 U.S.C. § 545.[1]

[1] 18 U.S.C. § 545.

"Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced . . . ; or

"Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—"

shall be punished as provided by law.

After a trial by jury King was convicted on both counts and given concurrent sentences thereon. The following facts were established by the evidence. At approximately 6:30 p.m. on March 6, 1964, United States Customs Agent J. D. Maxcy received information at his home at Chula Vista that appellant had gone to Tijuana, Mexico, to acquire a large quantity of amphetamine pills. The information had originally been received by a Sergeant Goodwin of the Los Angeles sheriff's office from an informant. Goodwin notified Inspector Larkworthy of the United States Food and Drug Administration, who in turn notified John Blockman, United States Customs Agent in Charge. Blockman then telephoned Agent Maxcy. The information received also disclosed that appellant would be driving one of two automobiles, which were described by model, color and license number and that appellant would cross the border "shortly after the race track or jai alai crowd broke in Mexico, which would be between 11 and 11:30 p.m." Agent Maxcy was further informed that appellant would probably make three separate trips, and that on the completion of the first trip he might "conceal or stash these pills in the Chula Vista or South bay area." At approximately 11:30 p.m. Maxcy observed a Cadillac automobile, which was one of the two cars which had been described to him, enter the United States through the port of entry. He did not stop the car at the border,[2] but followed it for about eight miles until it had passed the "E" Street cutoff in Chula Vista where Maxcy stopped it. Maxcy identified himself as a customs agent and asked King if he were bringing any contraband from Mexico. When King replied in the negative, Maxcy asked him if he

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[2]"THE COURT: Mr. Maxcy, what was the reason that you did not stop the defendant at the border?

"THE WITNESS: The reason, your Honor, was that we didn't follow normal procedure and post a look-out in this instance because the information I had in my possession was that Mr. King possibly was going to contact someone else in the Chula Vista or the South Bay area immediately adjacent to the border. For this reason we maintained our own surveillance separate from the inspector for the primary purpose of following him.

"THE COURT: In other words, you didn't stop him at the border because you wanted to try to make some further arrests in the event he contacted other persons.

"THE WITNESS: That is correct; yes, sir."

minded if they looked at the vehicle and he again replied in the negative. The vehicle was then searched, and, in a specially-built compartment in the trunk, the amphetamine tablets in question were found. Prior to trial a motion to suppress this evidence was denied by the court. During this motion to suppress, appellant's counsel requested the identity of the informant. The court ruled that this was a border search and that the identity of the informant was not material to the legality of the seizure.

Appellant makes three specifications of errors: (1) The contraband evidence upon which the conviction is predicated was seized illegally by officers of the United States Government; (2) the court erred in admitting an incriminatory statement by appellant after he had been arrested; and (3) the court erred in failing to grant a short continuance in order for appellant to demonstrate the materiality of the informant's identity on the question of guilt or innocence.

To establish his first specification of error, appellant contends that there was no probable cause to search his vehicle, and that, therefore, the contraband found in that search should not have been admitted in evidence. Putting aside the fact that there was evidence that appellant consented to the search, we point out that the district court held that this was a border search. We agree. As was stated in *Murgia v. United States*, 285 F.2d 14 at 16 (9th Cir. 1960), "No customs search can be made precisely at the border. All must be made somewhere north of the border between Mexico and the United States." In *Marsh v. United States*, 344 F.2d 317 at 324 (5th Cir. 1965), the court said, "The right of border search is indeed broad, and the border itself is elastic."

In this case the Customs Agent had received information that day that appellant was in Tijuana, Mexico, for the purpose of acquiring a vast amount of amphetamine tablets, and that on the same evening appellant, driving a particularly described vehicle, would bring these tablets into the United States from Mexico, probably making three separate trips. The information was further that on completion of the first trip the tablets might be concealed in the Chula Vista or South Bay area. Agent Maxey followed the car, keeping it in view at all times. When he saw that the vehicle had not made a turn off from the highway into

Chula Vista and when it appeared that appellant might be going to Los Angeles, he then stopped the vehicle, questioned the appellant, and thereafter searched the vehicle and found the contraband.

It thus appeared from the evidence that there had been no change of condition of the auto from the time it crossed the border until it was stopped. Whatever was in the auto when it was stopped was in it when it crossed the border. We hold that where, as here, duly authorized officers receive information that a person or vehicle is about to cross the border with contraband in violation of the laws of the United States, and where shortly thereafter a person or vehicle conforming substantially to the description thereof given to such officers is seen to cross the border, and where such person or vehicle is followed therefrom by said officers and kept under surveillance until stopped and searched, and where there is no reason to believe that there is any change in condition of such person or vehicle from that at the border so that whatever such vehicle contains or such person possesses at the time the search is made is the same as it was at the border, and where no unreasonable time elapses between the border crossing and the search and there is no unreasonable distance between the border and place the search is made, such search may be held to be a border search.[3]

This being a border search, special rules are applicable. The statutes involved are set out in the margin.[4] As we said in *Witt v. United States*, 287 F.2d 389 at 391 (9th Cir. 1961):

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[3]Appellant's reliance upon *Cervantes v. United States*, 263 F.2d 800 (9th Cir. 1959), is misplaced. In *Cervantes* it was pointed out that the appellant was not stopped in connection with a pursuit, but was stopped on the basis of information that some ten weeks before the appellant, Thayer, was supposed to have gone to Tijuana to purchase narcotics, that the government official had no information that the appellant that day was transporting any contraband material, and that the appellant was stopped some seventy miles north of the border on the basis of an alert for "possible suspects."

[4]19 U.S.C. § 482 provides:

"Any of the officers * * * authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle * * * on which * * * he or they shall suspect there is merchandise which * * * shall have been introduced into the United States in any manner contrary to law, whether by the person in pos-

"No question of whether there is probable cause for a search exists when the search is incidental to the crossing of an international border, for there is reason and probable cause to search every person entering the United States from a foreign country, by reason of such entry alone. That the customs authorities do *not* search every person crossing the border does not mean they have waived their right to do so, when they see fit. Here a precise description of the automobile in which appellant rode across the border (though not of its passengers) had been passed to the border guards as one being a possible bearer of heroin. This it was ultimately found to be. Mere suspicion has been held enough cause for a search at the border. Cervantes v. United States, 9 Cir., 1959, 263 F.2d 800, 803, note 5." (Emphasis original)

Similarly, in *Murgia, supra* at 17, we said:

"The right of border search does not depend on probable cause. Carroll v. United States, 1924, 267 U.S. 132, 154, 45 S.Ct. 280, 69 L.Ed. 543. Cf.: People v. Brown, 1955, 45 Cal.2d 640, 290 P.2d 528; Johnson v. United States, 1948, 333 U.S. 10, 16-17, 68 S.Ct. 367, 92 L.Ed. 436; People v.

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session or charge, or by, in or upon such vehicle * * * or otherwise, * * * and if any such officer * * * so authorized shall find any merchandise on or about any such vehicle * * * which he shall have reasonable cause to believe * * * to have been unlawfully introduced into the United States, * * * he shall seize and secure the same for trial."

19 U.S.C. § 1581 provides:

"(a) Any officer of the customs may at any time go on board of any * * * vehicle at any place in the United States * * * without as well as within his district * * * and examine, inspect, and search the * * * vehicle and every part thereof * * * and to this end may hail and stop such * * * vehicle, and use all necessary force to compel compliance."

Subdivision (d) requires the driver of such a vehicle, upon direction of such an officer, to come to a stop, and authorizes pursuit if he does not do so.

Subdivision (e) directs seizure of the vehicle if it shall appear that a breach of the laws of the United States is being or had been committed so as to render the vehicle or the merchandise on board of, or brought into the United States by, such vehicle, liable to forfeiture.

Subdivision (f) makes it the duty of the officer to effect the seizure.

Simon, 1955, 45 Cal.2d 645, 290 P.2d 531. '[The] searches of persons entering the United States from a foreign country are in a separate category from searches generally • • • [and] "are totally different things from a search for and seizure of a man's private books and papers • • •."' King v. United States, 5 Cir., 1958, 258 F.2d 754, at page 756, certiorari denied 359 U.S. 939, 79 S.Ct. 652, 3 L.Ed.2d 639, quoting Boyd v. United States, 1886, 116 U.S. 616, 623, 6 S.Ct. 524, 29 L.Ed. 746. Cf.: Blackford v. United States, 9 Cir., 1957, 247 F.2d 745, certiorari denied 356 U.S. 914, 78 S.Ct. 672, 2 L.Ed.2d 586; United States v. Yee Ngee How, D.C.N.D.Cal., 1952, 105 F.Supp. 517."

See also *Marsh v. United States, supra,* at 324, where it is said:

"Border searches are, of course, not exempt from the constitutional test of reasonableness. A true border search, however, is not regarded as unreasonable even though made without probable cause."

Sound policy considerations support the special treatment accorded border searches. Congress as well as the courts have thus recognized the peculiar and difficult law enforcement problems that necessarily are presented by the effective policing of our extensive national boundaries.

Under the above rules we hold that the evidence upon which the conviction in this case was based was not seized illegally.

The evidence concerning appellant's second specification of error discloses that after the search of appellant's automobile, Agent Maxey talked to appellant in the office of the Customs Agency Service at the port of entry. There, appellant was informed by Agent Maxey that "we were going to ask him a few questions pertaining to the contraband found in his vehicle, and that it was my duty to advise him under the Constitution of the United States he was under no duty to answer any questions that we asked him, and that he was entitled to be represented by an attorney should he so desire, and that anything he did say could be used against him should we have any future court proceedings." Appellant gave his name and occupation, disclosed that he had left his home in Long Beach about six p.m. on

March 6th, that he had driven to Tijuana, Mexico, by himself, and that he had gone to the dog races there. When asked questions pertaining to the pills found in the automobile, appellant stated "he had no comment to make about the pills at that time."

About an hour later appellant was taken by Agent Maxcy and another agent in an automobile from the port of entry to San Diego to be booked. During this ride certain questions were asked by Agent Maxcy and certain answers given by appellant. There was also a voluntary statement made by appellant. Upon appellant's objection to the offer of this evidence, the jury was excused, and in the absence of the jury, Agent Maxcy testified as shown in the footnote.[5] After hearing appellant's counsel's objections to the offer of this testimony, the court indicated that he would not admit the two answers to the questions, but that he would admit appellant's voluntary statement. The jury was then recalled and Maxcy testified before the jury as follows:

"Q [By Mr. Johnson]. Agent Maxcy, in your conversation in the vehicle with the defendant, Mr. King, was the word 'bread' mentioned?

"A Yes, sir, it was.

"Q And what was said, and by whom?

A Mr. King stated to myself and Inspector Addis that the biggest problem was getting them home. However, once

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[5]"THE WITNESS: . . . I asked him about the compartment in the vehicle, and he said it had been a great deal of work making it, and I carried on the conversation for a period of time, and then I said, 'Gee, how were you going to get those pills out of the car?' He said, 'I was going to get them out the same way you fellows got them out.'

"I discontinued the conversation for a short period of time again, and then at this time he stated a casual remark, 'Well, the main difficulty is getting these things home,' and, 'Once you get a taste for bread, you get yourself into a lot of trouble.'

"THE COURT: Was that last statement in response to anything that you had said?

"THE WITNESS: No, the latter one was not. The first was in response to a direct question. The latter one was not."

you get a taste for bread, you can get yourself in a lot of trouble."[6]

We see no error in the introduction of this evidence.

Likewise, there is no merit in appellant's third specification of error for two reasons. First, since the district court properly held that this was a border search, probable cause for the search and demonstration of sufficient reliable information to create probable cause was not required; consequently, appellant was not necessarily entitled to knowledge of the identity of the informer. Secondly, in the course of counsel's discussion with the court concerning the production of a deputy sheriff of Los Angeles named Burman who knew the identity of the original informer, it was stipulated by both counsel that if the deputy sheriff were called he would refuse to answer questions concerning the identity of the informer or the exact details of the informer's information or activity. Then, the proceedings as set out in the footnote occurred.[7] As shown by the record, counsel

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[6]In explanation of what the term "bread" refers to, the following testimony was given:

"THE COURT: Mr. Maxcy, what in parlance among persons who are dealing in contraband does the term 'bread' refer to?

"THE WITNESS: 'Bread' is a colloquialism, your Honor, for money. It is a slang term meaning money."

[7]"THE COURT: All right.

"MR. HUGHES: And I assume that we can also stipulate that if this situation arises, that Mr. Johnson on behalf of the United States would claim the privilege to be asserted on behalf of the witness, and would back the witness up in that respect.

"THE COURT: I don't know whether I would go along with that. That is my problem.

"MR. HUGHES: Then the only alternative, and this is the only possible way we could do it otherwise, is to get him down here.

* * *

"THE COURT: Again I say I don't know whether I would go along with allowing the witness not to answer certain of the questions you propounded. Nonetheless I will say that at this posture I don't believe that I would require the production of that evidence or the securing of

was offered the opportunity of producing essential evidence and decided that he would not take advantage of that offer. We see no error in the ruling of the court.

Judgment affirmed.

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that witness. It may be at some other posture of the case I would. So let's call the jury.

"MR. HUGHES: One minute, your Honor. We are almost through.

"THE COURT: If you want to put on any evidence to change that posture of the case, I will allow you to do so.

"MR. HUGHES: Yet me state my position, your Honor, I will say that these very questions—I will move first, then, for a continuance in order to permit me to get Burman here, and, in the alternative, that the Government dismiss, or that the Court dismiss, on the ground that I have been prevented from properly preparing my defense, in that the very questions to which we have stipulated the witness would claim the privilege are material, and that will enable me to get to the point where I can demonstrate to the Court the materiality of the identity of the informant.

"THE COURT: I think I have made my position clear. If you want to put on any evidence that would indicate to me that it might be necessary to require the witness to be present, I will consider it. Otherwise, the motion for a continuance is denied.

"MR. JOHNSON: At this time I would like to——

"THE COURT: Wait a minute. Mr. Hughes might have some reply there.

"MR. HUGHES: No. I was only going to point out, your Honor, that I think this violates the rule, that I cannot elicit these matters during the Government's case in chief.

"THE COURT: I will allow you to present the evidence out of the presence of the jury, if you wish.

"MR. HUGHES: No, I am relying on two things here, your Honor; the Rugendorf case——

"THE COURT: Look, I have made my position clear. If you want to put on any evidence outside of the presence of the jury for the purpose of indicating that an informer might possibly assist you in the defense, I will hear that evidence. If you don't wish to, that is up to you.

"MR. HUGHES: I will rely on the state of the record, as it is, your Honor.

"THE COURT: All right. Call the jury."

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE RAYMOND KING, Appellant,	)	
vs.	)	No. 19,624
UNITED STATES OF AMERICA, Appellee	)	

APPEAL from the United States District Court for the Southern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Southern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

STANLEY W. BARNES

O. D. HAMLIN

WALTER ELY
Circuit Judges

Filed and entered
July 2, 1965

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE RAYMOND KING,	)	"Docketed"
	)	
Appellant,	)	FILED AUG 4 1965
	)	Frank H. Schmid,
vs.	)	Clerk
	)	
UNITED STATES OF AMERICA,	)	No. 19624
	)	
Appellee.	)	

On Petition for Rehearing

Before: BARNES, HAMLIN and ELY, Circuit Judges

The petition for rehearing in the above-entitled case is denied.

Dated: August 3, 1965.

STANLEY W. BARNES

O. D. HAMLIN

WALTER ELY
Circuit Judges

APPENDIX D

Title 18, U.S.C. Section 545

"Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law --

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section shall be forfeited to the United States.

The term 'United States', as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Guam."

APPENDIX E

Constitution of the United States - Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 529

LAWRENCE RAYMOND KING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 11-19; R. I, 34) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1965 (Pet. 20; R. I, 43). A petition for rehearing was denied on August 4, 1965 (Pet. 21; R. I, 44). The petition for a writ of certiorari was filed

on September 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied a fair trial by the trial court's refusal to grant a continuance to permit him to examine a witness who knew an informant's identity, when petitioner consistently refused to indicate (outside the presence of the jury) what his defense would be or how the identity of the informant would be material to that defense.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted under a two-count indictment charging the smuggling of approximately 500,000 amphetamine tablets into the United States, and the concealment of the tablets with knowledge of illegal importation, in violation of 18 U.S.C. 545. He was sentenced to imprisonment for three years and to pay a $1000 fine on each count, the prison terms to run concurrently (R. I, 25).

The evidence showed that at about 11:30 p.m. on March 6, 1964, as petitioner drove a Cadillac automobile across the border from Mexico, he was placed under surveillance by United States Custom Agent Maxcy and other agents, followed some 8 miles, stopped, and the vehicle searched. In a specially built metal compartment in the trunk of the automobile, the agents found the 500,000 amphetamine tablets. Agent Maxcy,

earlier that evening, had received information from his superior that petitioner had gone to Tijuana for the purpose of acquiring a large amount of amphetamine pills; that he would cross the border between 11 and 11:30 p.m., driving one of two automobiles described as to model, color and license number; and that, on the first of the probable three trips he would make, he would conceal the contraband in an area that was reached on the road just prior to the point where he was stopped by the agents (Tr.[1] 5-10; 32-40; 53-55).

A month after indictment, petitioner filed a motion to suppress evidence as having been illegally seized, and a motion for a bill of particulars requesting the identity of the persons who knew he was entering the country with the pills (R. I, 6). At a hearing on the motions, defense counsel asserted that he was seeking the name of the informant (Tr. 3-4; 31). The court heard testimony by Agent Maxcy, ruled that the evidence had been seized legally during a border search, and found it unnecessary to decide whether the identity of the informant need be disclosed in order to question the existence of probable cause (Tr. 26-28).

At trial petitioner renewed his contention that the evidence had been illegally seized (Tr. 37-38) and also asked for a hearing outside the presence of the jury to show that the identity of the informant was material to his defense (Tr. 43, 52). At this time Agent Maxcy[2], under questioning by defense counsel,

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[1] "Tr." references are to Volume II of the Record.

[2] Official reports made by Agent Maxcy to the United States Attorney were produced for the defense (Tr. 55-57).

testified that he had received information as to petitioner's intended entry from his superior, Agent Brockman, who in turn had received the information from a Federal Food and Drug Inspector Larkworthy in Los Angeles (Tr. 55). Defense counsel next called Inspector Larkworthy, who testified that he had received the information from an Inspector Sumega in his office and that it was his understanding that Sumega's source of information was Sergeant Goodwin of the Los Angeles County Sheriff's Office (Tr. 59-60). When counsel then indicated that he wanted Sergeant Goodwin produced, the court reminded him that he had not yet indicated how the identity of the informant might be helpful to his preparation or his defense (Tr. 63). Asked specifically "What is your defense?" (Tr. 64), counsel asked the court to "assume" that the government had not proved knowledge. When the court answered that it could not so assume on the basis of the evidence, counsel explained (Tr. 65):

> [Mr. Hughes]: I am not right now to the point where I am demanding the identity of the informer. I will say that we will eventually get there, but the only way I am going to reach it is this: All I want to do is to be given an opportunity to get Goodwin down here, and ask him what information he received, and at that point if I ask for the identity of the informer, then your Honor will be in a position to rule,
> * * *

The court answered that it would not grant a continuance until there was sufficient information before it to rule on the question whether the informant's

identity need be disclosed (Tr. 65). After further discussion, during which the court reiterated that it wished to know what the defense was, the court suggested that counsel speak to Goodwin during the noon recess (Tr. 66-67). After recess, when defense counsel informed the court that Goodwin had refused to discuss the matter and that a subpoena had been issued, the court suggested that it be ascertained whether Goodwin would be willing to disclose the identity of his source of information. It asked respective counsel if each would be willing to stipulate that Goodwin would refuse such disclosure and they answered affirmatively. Defense counsel added that his next step would be to urge that the government must elect to dismiss (Tr. 68-70). When defense counsel argued that he still needed Goodwin to show the extent of participation of the informant, the court granted a recess to permit counsel to reach the officer (Tr. 70-72). Thereafter the court was advised that Goodwin was on vacation but an attempt was being made to reach him (Tr. 72).

The following day counsel informed the court that while Goodwin had not been reached, contact had been made with Los Angeles County Deputy Sheriff Burman, who had been present at all discussions between Goodwin and the informant and who knew the informant. On the basis of Burman's statement, both counsel stipulated that Burman, if called, would refuse to supply detailed information which would reveal the identity of the informant and would also decline to state: (1) whether the informant was a resident of Los Angeles or Tijuana; (2) how close the in-

formant was to the venture; (3) whether the informant had revealed where and when the delivery of the tablets was to be made or where the tablets were picked up or placed in the car or who was present; and (4) whether the informant was present when the compartment in the trunk of the Cadillac was constructed (Tr. 95). The court indicated that it was not certain that it would allow the witness to claim the privilege as to certain of the proposed questions but that, in the posture of the case as it then stood, there was no reason for requiring the production of the evidence or the witness.

Defense counsel moved for a continuance to produce Burman or in the alternative for a dismissal. The court repeatedly indicated that if defense counsel wanted to produce evidence outside the presence of the jury to show how the informant might possibly assist the defense, it would hear the evidence. Defense counsel indicated he would rely on the record as it stood (See Pet. 18-19, fn. 7), and rested his case (Tr. 98).

ARGUMENT

Although given every opportunity to show how the name of the informant could possibly aid his defense, petitioner failed to do so.[3] At most he made the bare assertion that identity would be material on the ques-

[3] As both courts below properly held, since the right of a border search does not depend upon a showing of probable cause, the identity of the informant was not required to demonstrate such probable cause.

tion of how the pills were placed in the vehicle and how the compartment in the car was constructed, etc. (Tr. 52-53). He did not indicate any defense to which these questions might be material. He did not claim entrapment or lack of knowledge of the presence of the contraband, nor did he attempt to justify or explain its presence in any way. There was thus no reason for the court to require disclosure of the name of the informant or delay the trial. See *Rugendorf* v. *United States*, 376 U.S. 528.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER, 1965.

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